

Employer Alert: NLRB Holds a General Recommendation of Maintaining Confidentiality During Internal Investigations As An Infringement on Employees Section 7 Rights

AUTHOR: SANDBERG PHOENIX

By Timm W. Schowalter

Timm Schowalter type ui The National Labor Relations Board (NLRB) has continued its well-established pattern of finding routine and generally accepted personnel practices as an unlawful infringement on employee's free speech rights. Conventional wisdom is to maintain confidentiality of informant and witness statements in internal investigations. In doing so, employers routinely request or recommend employees to maintain the confidential nature of the facts discussed during the investigation in order to maintain the neutrality and objectiveness of witnesses. To further promote objective and fair investigations, The Boeing Company promulgated a general workplace notice to employees that recommended employees refrain from discussing a case during a pending investigation. Makes perfect sense right? Wrong?!?

In the *Boeing Co*, the NLRB held that Boeing's notice violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by distributing and maintaining an overbroad confidentiality recommendation. The Board found that the notice coerced or inhibited employees from exercising their fundamental rights protected by Section 7 of the NLRA . An employer may only prohibit employee discussion of an investigation when the employer's need for confidentiality concerning that specific investigation outweighs employees' Section 7 rights. Boing was unable to show the requisite "need" when issuing its generalized notice that was not specific to a particular investigation.

Employer Take Away: The Board continues to place the onus on employers to show that they have a legitimate interest in instructing or requesting that employees maintain confidentiality during workplace investigations each time employers make that kind of request. Accordingly, employers should generally avoid a blanket rule about confidentiality during investigations and, instead, determine on a case-by-case basis whether to request confidentiality. Also, consider outlining in a memorandum or other internal document accompanying each investigation why it is necessary to request that employees not discuss that particular workplace investigation.